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Machado v. Ryan Respondent's Cross Appellant's Brief Dckt. 37888

IN THE SUPREME COURT OF THE STATE OF IDAHO

JERRY MACHADO and TERRY MACHADO, husband and wife, Appellants/Cross Respondents, vs. CHARLES L. RYAN and CAROL RYAN, husband and wife, Trustees of the CHARLES AND CAROLYN RYAN TRUST, et al., Respondents/Cross Appellant.	BENEWAH DC DOCKET NO. CV-07-464 SUPREME COURT DOCKET NO. 3788-2010
KRISTOPHER JONES, Respondent/Cross Appellant, vs. RICHARD W. CLIFTON; JERRY MACHADO and TERRY MACHADO, husband and wife, et al., Appellants/Cross Respondents.	

RESPONDENT'S/CROSS APPELLANT's REPLY BRIEF

Appeal from the District Court of the First Judicial District
of the State of Idaho in and for the County of Benewah

HONORABLE LANSING L. HAYNES
District Court Judge

Attorney for Appellants/Cross Respondents
APRIL M. LINSCOTT, ISB #7036
Linscott Law Firm, PLLC
1423 N. Government Way
Coeur d'Alene, ID 83814

Attorney for Respondents/Cross Appellants
IAN D. SMITH, ISB #4696
Attorney at Law
608 Northwest Blvd., Suite 101
P.O. Box 3019
Coeur d'Alene, ID 83816-3019

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REBUTTAL TO MACHADO'S STATEMENT OF FACTS

Ryan disputes certain facts set forth in Machado's Statement of the Case and offers the following rebuttal:

1. Dickinson did not build a "logging road," Dickinson built access roads to access each ten acre parcel being sold by Timberland (Tr. Vol. I, P. 541, Ln. 19).
2. Clifton testified that there was a road upon his property when he purchased it (Tr, Vol I, P. 102, Ln. 17-25).
3. Clifton testified that the road on his property, which existed at the time of his purchase, traveled from Flat Creek Road through his property to the Anderson property (Tr. Vol. 1, P. 103, Ln.5-21).
4. Forrest Anderson testified that he used the road now known as Shamrock Lane since the 1950's to access the Anderson property which is north of the Machado and Clifton properties (Tr. Vol. I, P. 510, Ln. 18-25 and Tr. Vol. I, P. 511, Ln. 1-16).
5. Clarence Thomason testified that he came to the Flat Creek area in 1971 (Tr. Vol. I, P. 536, Ln. 19-23). Clarence Thomason also testified that the road now known as Shamrock Lane existed as a road since he arrived in the Flat Creek area (Tr. Vol. I, P. 560, Ln. 20-25; Tr. Vol. I, P. 561, Ln. 1-9; Tr. Vol. I, P. 561, Ln. 19-23; Tr. Vol. I, P. 562, Ln. 13-24).

6. Clarence Thomason testified that the there were three (3) trailers on the Moak property (Tr. Vol. I, P. 566, Ln. 21-25; Tr. Vol. I, P. 567, Ln. 1-16).

7. Exhibit D depicts a roadway in the approximate location of Shamrock Lane.

REBUTTAL TO MACHADO'S REPLY BRIEF

A. Easement Implied by Prior Use

Machado concedes that Ryan has proven the first element of an Easement Implied by Prior Use: (1) Unity of title or ownership and subsequent separation by grant of the dominant estate. Machado then argues that the remaining two elements of an Easement Implied by Prior Use have not been established: (2) Apparent continuous use long enough before separation of the dominant estate to show that the use was intended to be permanent; and (3) The easement must be reasonably necessary to the proper enjoyment of the dominant estate. However, Machado cites no law, nor makes any argument in support of their claim that Ryan has not proven the third element of an Easement Implied by Prior Use. Therefore, Machado has conceded that Ryan has established this element.

The remaining element which Machado provides legal authority and argument in support of centers upon the second element of an Easement Implied by Prior Use: (2) Apparent continuous use long enough before separation of the dominant estate to show that the use was intended to be permanent.

1. Apparent continuous use long enough before separation of the dominant estate to show that the use was intended to be permanent

Machado asserts that "[p]rior to Dickinson building the roads, there were no roads on the subject property" (Machado's Reply Brief, P. 4). This is a false statement. The use of the portion of Shamrock Lane that runs in a north/south direction between Flat Creek Road and Anderson's property had been used by Forrest Anderson since the 1950's. The use of the portion of Shamrock Lane, which turned down to the Ryan and Jones Properties, was admittedly used for a shorter period of time. Chris Thomason and Clarence Thomason stated they used Shamrock Lane in the Spring of 1971 to access the Anderson property and the Ryan Property. The Timberland Survey depicts a road in the location of Shamrock Lane and states the road had been in existence prior to August 1971. Therefore, the entirety of the road now known as Shamrock Lane was in existence and being used prior to the severance of the Ryan and Jones parcels from the Timberland parent parcel and prior to the severance of the Clifton parcel from the Timberland parent parcel.

Furthermore, evidence of the use of the easement (Shamrock Lane) is not the only means to evidence the fact the easement (Shamrock Lane) was intended to be permanent. In this case, not only is there evidence of use of the easement, but there is documentary evidence that the use of the easement to access the Ryan Property and the Jones Property via Flat Creek Road and Shamrock Lane was intended to be

permanent. That documentary evidence is the literature and maps which Jones received from Timberland indicating access to the property at issue herein would be via private road and depicting the location of said road where Shamrock Lane lies today, and the Timberland Survey, which identifies what are now known as Flat Creek Road and Shamrock Lane as "Private road - Easement reserved". Therefore, the second element of an easement implied by prior use has been satisfied.

B. Easement by Prescription

Machado argues that Ryan has failed to meet their burden of proof relative to all five elements of an Easement by Prescription.

1. Open and Notorious Use

Machado claims that Ryan has failed to establish that the use of Shamrock Lane was open and notorious. The case cited by Machado in support of their position, **Backman v. Lawrence, 147 Idaho 390, 210 P3d 75 (2009)** states that the "open and notorious" use must be sufficient to put a reasonable land owner, who maintains a reasonable degree of supervision over his premises, to have discovered said use. The first inquiry must be whether Clifton was a reasonable land owner exercising a reasonable degree of supervision over his own property. The record reflects that Clifton purchased the property while drunk, was employed by the merchant marines and on the high seas after his purchase, and made infrequent visits to the property. Clifton is not a reasonable land owner exercising a reasonable degree of supervision over his

premises. Even with those facts, the use of Shamrock Lane by Moak to access their residence, without Clifton's permission, was known to Clifton as early as the early 1980's. In addition, someone unknown to Clifton had put gravel on the road that is not Shamrock Lane (Tr. Vol I, P. 63, Ln. 7-25; Tr. Vol. 1, P. 64, Ln. 1-20).

Shamrock Lane was maintained by Clarence Thomas for the Moak's (Tr. Vol. I, P. 554, Ln. 4-24) and Ryan maintained Shamrock Lane through the date of Trial (Tr. Vol. I, P. 488, Ln. 13-23; Tr. Vol. I, P. 491, Ln. 11-22; Tr. Vol. I, P. 466, Ln. 23-25; Tr. Vol. I, P. 467, Ln. 1-25; Tr. Vol. I, P. 468, Ln. 1-4; Tr. Vol. I, P. 468 Ln. 18-25; Tr. Vol. I, P. 469, Ln. 1-24; Tr. Vol. II, P. 854, Ln. 21-25; Tr. Vol. II, P. 855, Ln. 1-25; Tr. Vol. II, P. 856, Ln. 1-15; Tr. Vol. II, P. 858, Ln. 12-25; Tr. Vol. II, P. 859, Ln. 1-25; Tr. Vol. II, P. 860, Ln. 1-10; Tr. Vol. II, P. 861, Ln. 1-23). There was a trailer on the Moak property until 1988 (Tr. Vol. I, P. 486, Ln. 17-25).

In addition to the use of Shamrock Lane by Moak, Ryan used Shamrock Lane to access their property after purchasing it in 1989 (Tr. Vol. I, P. 488, Ln. 13-23; Tr. Vol. II, P. 836, Ln. 13-25; Tr. Vol. II, P. 387, Ln. 1-25; Tr. Vol. II, P. 388, Ln. 1-24).

Clifton was, in his own words, "an absentee owner" and it was hard for him to tell who had been on his property. Clifton testified that he tried to block the road with logs but every time he would return to the property, the logs would be gone (Tr. Vol. I, P. 79, Ln. 11-15).

Clearly the use of Shamrock Lane by Moak was open and notorious to the point that Clifton was on notice of said use as Clifton testified to his knowledge of the use. Furthermore, Shamrock Lane was maintained during Moak's use and was maintained and used by Ryan on and after the date Ryan acquired the property sufficient to put Clifton on notice of the use. As a result, the element of "open and notorious use" has been satisfied.

2. Continuous and Uninterrupted Use

Machado claims that Ryan has failed to establish that the use of Shamrock Lane was continuous and uninterrupted. Machado claims that Ryan did not maintain Shamrock Lane for a twenty year period. As set forth above, Clifton noticed that someone had placed gravel on the road when Moak owned the property, Clarence Thomas maintained the road when Moak owned the property, and Ryan continued the maintenance. However, maintenance is not the only way to establish "continuous and uninterrupted use".

In ***Beckstead v. Price, 146 Idaho 57, 190 P.3d 876 (Idaho 2008)*** this Court stated in Footnote 1:

> The Prices claim because the Becksteads' use was only seasonal, it was not continuous and uninterrupted. First, the cases cited by the Prices do not support their contention because they are factually dissimilar. ***See Brown, 140 Idaho at 443, 95 P.3d at 61; Anderson , 136 Idaho at 406, 34 P.3d at 1089***. Second, it is generally accepted that the " continuous and uninterrupted" element does not require daily use or even monthly use. ***25 Am.Jur.2d Easements and Licenses § 61 (2004)***. The

acquisition of a prescriptive easement requires continuous use " according to the nature of the use and the needs of the claimant." ***Id.***

Continuous and uninterrupted use of Shamrock Lane is as follows: Moak used the road to assess their property; friends and acquaintances of Moak used the road to check on the Moak property and take care of the Moak dog while Mr. Moak was incarcerated; Mr. Moak returned to the property after being released; Ryan used the road as their sole access their property commencing 1988 (Tr. Vol. I, P. 550, Ln. 1-10; Tr. Vol. I, P. 568 Ln. 12-25; Tr. Vol. I, P. 569, Ln. 1; Tr. Vol. I P. 427, Ln. 2-7; Tr. Vol. I P. 432, Ln. 6-12; Tr. Vol. I P. 528, Ln. 15-25; Tr. Vol. I, P. 529, Ln. 1-3; Tr. Vol. I, P. 529, Ln. 8-9; Tr. Vol. I P. 531, Ln. 4-16; Tr. Vol. I P. 532, Ln. 8-10;Tr. Vol. I P. 635. Ln. 15-20; Tr. Vol. I P. 636, Ln. 12-20; Tr. Vol. I P. 484, Ln. 19-25; Tr. Vol. I P. 485, Ln. 1-22; Tr. Vol. I P. 500, Ln. 11-24; Tr. Vol. II P. 878, Ln. 115; TR. Vol. II, P. 879 Ln. 10-23).

As set forth above, the maintenance of the road is not the sole means by which to establish continuous and uninterrupted use. The actual use of the road over the years by Moak, by Moak's friends and family and by Ryan, combined with the maintenance of the road, results in the establishment of the element of "continuous and uninterrupted use".

3. Wild and Unenclosed

Machado claims that burden shifting theory as articulated in ***Hodgins v. Sales, 139 Idaho 225, 76 P3d. 969 (2003)*** is applicable to this case. The first consideration is whether the property at issue herein is was "wild and unenclosed" at the time of the prescriptive use. The Clifton property was no unenclosed. The testimony of various witnesses established that the Clifton property was enclosed by a fence on the northern and eastern boundaries which were in place prior to Clifton's purchase of the property (Tr. Vol. I P. 34, Ln. 25; Tr. Vol. I, P 35, Ln. 1-19; Tr. Vol. I P. 116, Ln. 21-24; Tr. Vol. I P. 421, Ln. 7-25; Tr. Vol. I, P. 347, Ln. 12-25; Tr. Vol. I P. 511. Ln. 17-25; Tr. Vol. I, P 512, Ln. 12-19; Tr. Vol. II, P. 873, Ln. 3-9; Tr. Vol. II, P.873, Ln. 14-24; Tr. Vol. II, P. 874, Ln. 1-7; Tr. Vol. II, P. 874, Ln. 17-22.).

Furthermore, Clifton's property was sold to him by a logging company and there is testimony in the record that the property had been logged before purchased by Clifton. In addition, there was testimony from Anderson that cattle had been run on the Clifton property prior to Clifton's purchase. Hence the need for the fences. It is a stretch to conclude that a parcel of property that had been logged, had been fenced and had cattle run on it is "wild and unenclosed".

However, even if Clifton's property is found to be "wild and unenclosed," the analysis does not end. Such a finding would result in a rebuttable presumption that the use of Shamrock Lane by persons other than Clifton was permissive. That presumption

is overcome by Clifton's testimony wherein he knew that Shamrock Lane was being used by Moak and Ryan but he never gave anyone permission to use Shamrock Lane (Tr. Vol. I, P. 64, Ln. 10-14; Tr. Vol. I, P. 66, Ln. 14-25; Tr. Vol. I, P. 67, Ln. 1-2). Clifton aiso testified that he found Charles Ryan working on the road and told Mr. Ryan to get off of his property and he told Mr. Ryan that "this is my property" (Tr. Vol. I, P. 80, Ln. 25, Ln. 1; Tr. Vol. I, P. 81, Ln. 1-21; Tr. Vol. 1, P. 1-16; Tr. Vol. I, P. 83, Ln. 10-24).

Clifton definitively testified that the road was being used by other individuals but that no one had obtained his permission to use the road (Tr. Vol. I, P. 85, Ln. 12-14).

Machado claims that there is ample evidence in the record to support their claim that the use of Shamrock Lane by individuals other than Clifton was permissive. Machado makes no reference to the record in this regard and, in fact, the opposite is true. The record reflects that the use was not permissive.

4. Use by General Public

Machado claims that Clifton was not on notice of the adverse use of Shamrock Lane because the use by Moak and Ryan was shared by the general public. As stated above, Clifton was aware that Moak was living on their property and using Shamrock Lane to access their property, Clifton was aware that Moak was parking vehicles on his property, Clifton was aware that someone had placed gravel on the road, Clifton was aware that Ryan was working on the road and using the road to access their property. None of these uses are the type of use shared with the general public.

5. Statutory Period of Use

The period of use of Shamrock Lane by Moak, and the period of the use of Shamrock Lane by friends and family of Moak, when tacked to the use of Shamrock Lane by Ryan, satisfies the statutory requirement.

C. Express Easement

Machado fails to address the real issue in this case. Is the language in Clifton's deed ambiguous? If so, how should the ambiguity be resolved? Clifton's deed contains language which states that the conveyance of the property was subject to: "Easement of Record, which allows joint usage of a road over and across the described property and adjacent property which runs with the land, for ingress and egress from the described property as recorded November 6, 1970 in Book 154 of Miscellaneous Records, Page 394, records of Benewah County, Idaho. . ."

The "described property" is Clifton's property in Section 19. The "Easement of Record" does not include any property in Section 19. Clearly Clifton's deed is ambiguous because the very language contained therein burdens the property with a previously recorded easement that is in a neighboring section. Machado offers no explanation for this ambiguous language.

Why would the easement language be contained in Clifton's Deed if Timberland had no intention to encumber Clifton's property with an easement? Had Clifton's deed been devoid of any language regarding an easement, then perhaps Clifton could claim

he was unaware of the fact that his property was encumbered by an easement. However, the language in Clifton's Deed clearly states his property is encumbered by an easement. As evidenced by the Timberland Sales literature, the statements of Montee Dickinson, the Timberland Survey, and the easement language in the subsequent deeds executed by Timberland, clearly it was Timberland's intention to encumber Clifton's property with an easement. Clifton has notice of the fact that his property was burdened by an easement based upon the very language of his deed.

Furthermore, if Timberland had no intention to burden Clifton's property with an easement, how was Timberland to access any of their remaining property? An easement reserved for Timberland was necessary to access their remaining lands.

The record contains ample evidence to support the District Court's finding of an express easement.

D. Implied Easement by Necessity

1. Time of Severance

Machado claims that at the time of the conveyance from Timberland to Clifton, there were no roads on Clifton's property. This is a false statement. Clifton testified that a road existed on the property at the time of his purchase (Tr. Vol. I, P. 102, Ln. 17-25; Tr. Vol. I, P. 103, Ln. 5-21). Forrest Anderson testified that a road in the location of Shamrock Lane existed since the 1950's (Tr. Vol. I, P. 510, Ln. 18-25; Tr. Vol. I, P. 511,

Ln. 1-16). Clarence Thomas testified that a road in the location Shamrock Lane existed even before Timberland acquired the property (Tr. Vol. I, P. 563, Ln. 15-20).

Machado also claims that Timberland could access all of their remaining property from Flat Creek Road. The fact is that the deed to Clifton did not reserve an easement for Timberland. The easement referenced in Clifton's deed was for a road in a neighboring section. Furthermore, Clifton testified that he directed where Flat Creek Road was to be placed, not Timberland (TR. Vol. I, P. 46, Ln. 18-24; TR. Vol. I, P. 47, Ln. 12-25; Tr. Vol. I, P. 48, Ln. 1; Tr. Vol. I, P. 48, Ln. 9-16). That being the case, Clifton had no obligation to place Flat Creek Road in a location which permitted Timberland to access their remaining property. In fact, there is nothing in the record to indicate that Clifton placed Flat Creek road in such a manner as to benefit any property other than his own. Furthermore, there is nothing in the record to indicate Timberland intended Flat Creek Road to encroach on the Ryan property. The fact that Flat Creek Road does encroach on the Ryan property is solely the result of actions of Clifton, as by Clifton's own testimony wherein he told Montee Dickinson where to place Flat Creek Road.

As a result, there was a necessity for an easement at the time of the severance of the Clifton property as there was no means for Timberland to access the remainder of their property.

2. Great Present Necessity

Machado claims that there is no great present necessity for an easement across Clifton and Machado's property. The present necessity for the use of Shamrock Lane for Ryan and Jones to access their respective properties is great. As stated above, other than Shamrock Lane, Jones has no means to access his property. While Flat Creek Road does cross the extreme south east corner of the Ryan property, Ryan cannot drive off of Flat Creek Road onto the Ryan property due to the extremely steep slope of the Ryan property in the immediate vicinity of Flat Creek Road. Machado claims that Ryan can access his property via the "power pole road" from Flat Creek Road. Machado's own expert witness testified that the alleged "power pole road" was ". . .an old skid trail type deal" (Tr. Vol. II, P. 1257, Ln. 10-12), ". . . about a 30-35 percent slope" (Tr. Vol. II, P. 1263, Ln. 6-7), that he would not use any portion of the "power pole road" to construct a new road "because the skid trail is too steep" (Tr. Vol. II, P. 1264, Ln. 17-24), "it really would not be a good road" (Tr. Vol. II, P. 1265, Ln. 1-2), that "you don't even want to go down that" (Tr. Vol. II, P. 1265, Ln. 9-10). Furthermore, as set forth in the Statement of Facts herein, actually building a road from Flat Creek would require the removal and re-location of the power pole, would require an unreasonable amount of fill material, an unreasonable disruption of the Ryan property, unreasonable cost and negatively affect the property value of the Ryan property. In addition, the creation of a road from Flat Creek Road to the Ryan property would result

in an unsafe intersection on Flat Creek Road due to the steep grade of Flat Creek Road and a curve on Flat Creek Road at said location (Tr. Vol. II, P. 998, Ln. 16-25; Tr. Vol. II, P. 999, Ln. 9-25; Tr. Vol. II, P. 1000, Ln. 1-3). Conversely, Shamrock Lane intersects with Flat Creek Road on a flat, wide, straight portion of Flat Creek Road that provides superior line of sight and safety (Tr. Vol. II. P. 1000, Ln. 4-15).

Ryans have oriented their residence in conformity with the location of Shamrock Lane (Tr. Vol. II, P. 1027, Ln. 23-25; Tr. Vol. II, P. 1028, Ln. 1-3). Building a new road as proposed by Machado from Flat Creek Road would access the Ryan "bone yard" and shop, not the Ryan residence (Tr. Vol. II, P. 1026, Ln. 25; Tr. Vol. II, P. 1027, Ln. 1-10). The proposed access would require building a new road approximately 485 feet in length, would require between 1,200 and 4,000 cubic yards (between 120 and 400 dump truck loads) of fill material because of a steep slope, would require the removal and relocation of a power pole and the removal of timber from the Ryan Property, and would require the installation of a culvert with additional fill material (Tr. Vol. II, P. 1025, Ln. 18-25; Tr. Vol. II, P. 1026, Ln. 1-25; Tr. Vol. II, P. 1249, Ln. 1-25; Tr. Vol. II, P. 1264, Ln. 21-22; TR. Vol II, P. 1273, Ln. 20-25; Tr. Vol. II, P. 1274, Ln. 1-20; Tr. Vol. II, P. 1275, Ln. 5-12; Tr. Vol. II, P. 1280, Ln. 12-14; Tr. Vol. II, P. 1305, Ln. 24-25; Tr. Vol. II, P. 1306, Ln. 1-25).

The vertical drop from Flat Creek Road at the location of the proposed road to the Ryan residence is approximately 40 feet over a 400 foot distance. The proposed

road would necessitate a sweeping switchback. The height of the fill for the proposed alternative access road would be 20 feet off the native ground for a length of 100 feet. The base of the fill would be 40 feet wide for a 14 foot wide roadway surface. The width of the fill slope at the culvert would be 35 feet for a distance of 40 feet. The estimated cost of the construction of the road proposed by Machado is $22,368.07. This cost does not include the removal and replacement of the power pole nor the placement of a culvert (Tr. Vol. II, P. 1252, Ln. 22-24; Tr. Vol. II, P. 1261, Ln. 6-11; Tr. Vol. II, P. 1300, Ln. 1-25; Tr. Vol. II, P. 1301, Ln. 1-25; Tr. Vol. II, P. 1302, Ln. 1-19; TR. Vol. II, P. 1306, Ln. 10-23; Tr. Vol. II, P. 1305, Ln. 15-25).

An access road leading to the Ryan shop and not their residence as proposed by Machado would have a negative impact of the value of the Ryan Property (TR. Vol. II, P. 1028, Ln. 4-25; TR. Vol. II, P. 1029, Ln. 1-25).

Machado claims that Ryan expended money on the maintenance of Shamrock Lane that should have been use to construct a new road. What Machado fails to consider is the fact that Ryan maintained the road over a long period of time with the full knowledge of Clifton and that Clifton took no affirmative steps to stop Ryan from using and maintaining the road. It is certainly unreasonable for Clifton to sit back over the years and permit Ryan to expend their funds for maintenance and then, years later, claim that Ryan should have used the money to construct a road in a different location. In addition, the money expended by Ryan on maintenance of Shamrock Lane was over

a long period of time. The roadway proposed by Machado is such that it cannot be constructed over a long period of time. Due to the steep grade, the proposed alternative road would have to be constructed in one season to be functional. Ryan did not, and does not, have the financial resources to construct such a road in such a time frame.

Machado incorrectly states that Ryan put between 1024 and 1280 yards of fill into the Machados' driveway. The testimony of Charles Ryan testimony indicated one 12 yard truckload per hour for 4 or 5 days. One 12 yard dump truck per hour for 8 hours a day for 5 days = 96 cubic yards per day x 5 days = 480 cubic yards. One 4 yard dump truck per hour for 8 hours a day for 5 days = 32 cubic yards x 5 days = 160 cubic yards. Therefore the total is 640 cubic yards, not the 1024 to 1289 yards stated by Machado.

Machado also states that Ryan moved a power pole and thereby blocked the "power pole road" (a road which Ryan asserts has never existed). This is a false statement. The portion of Charles Ryan's testimony cited by Machado refers to the removal of power poles from an Army Depot from Hermiston, Oregon and the transportation of the same from Hermiston to the Ryan property for use in the construction of the Ryan residence (Tr. Vol. II, P. 866, Ln. 21-25; Tr. Vol. II, P. 867, Ln. 1-16).

The record contains ample evidence to support the District Court's finding that Ryan and Jones have a great present necessity to use Shamrock Lane to access their respective property.

E. Easement Width

Machado only addresses the width of the snow removal easement, not the width of the travel portion of the easement.

Machado claims that Shamrock road began as a logging road in 1971. This is contrary to Machado's claim that there was no road on Clifton's property in 1971. Machado also claims that the logging road was not used in the winter. There is nothing in the record to support such a conclusion.

Machado cites ***Argosy Trust v. Winiger, 141 Idaho 570, 114 P.3d 128 (2005)*** for the proposition that the Court should consider the circumstances at the time the easement was given to determine the extent of the easement.

In this case, the circumstances, as evidenced by the Timberland sales literature, and the testimony of the witnesses demonstrate that the Timberland properties were sold for residential purposes. Residential purposes reasonably includes year-round access. Year round access in an area in which there is substantial snowfall requires that snow to be plowed from the roads and that the snow be moved to the side of the road. It is reasonable to conclude that the circumstances existing at the time of the

grant of the easement that a 15 foot snow removal easement was necessary for residential use of the property sold by Timberland.

NOTICE OF ERRATA

On Page 16 of Respondents initial brief, the first sentence of the third full paragraph contains an error. The sentence which reads: "Clifton knew is property was not located in Section 19. . ." This sentence should read: "Clifton knew his property was located in Section 19. . ."

CONCLUSION

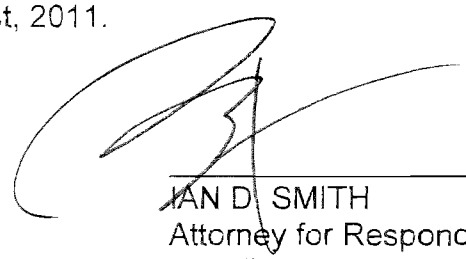
A trial court's factual findings will be set aside only if they are clearly erroneous ***Lovitt v. Robideaux, 139 Idaho 322, 325, 78 P .3d 389, 392 (2003)*** (citing I.R.C.P. 52(a). Findings of fact are not clearly erroneous when they are supported by substantial and competent evidence. Id. "Evidence is substantial and competent if a reasonable trier of fact would accept it and rely on it." Id. Findings based on substantial and competent evidence will not be overturned on appeal even in the face of conflicting evidence. ***Benninger v. Derifield, 142 Idaho at 489, 129 P .3d at 123 (2006)***. "It is the province of the district judge acting as trier of fact to weigh conflicting evidence and testimony and to judge the credibility of the witnesses." ***Id.***

There is substantial and competent evidence to support the District Court's finding that Ryan and Jones have an easement across the Clifton and Machado property based upon the legal theories of express easement and easement implied by

prior use. There is also substantial and competent evidence to establish that Ryan and Jones have an easement across the Clifton and Machado property based upon the legal theories of easement by prescription and easement implied by necessity. There is substantial and competent evidence to support the finding of the District Court that a snow removal easement is appropriate and does not impose any greater burden upon the Clifton and Machado property than is necessary.

It is respectfully requested that the Court uphold the decision of the District Court.

DATED this 5th day of August, 2011.



IAN D. SMITH
Attorney for Respondents/Cross Appellants

CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of August, 2011, I caused two (2) duplicate true and correct copy of the foregoing document to be served by the method as indicated below, and addressed to the following:

April M. Linscott
Linscott Law Firm, PLLC
1423 N. Government Way
Coeur d'Alene, ID 83814

[ ] Hand Delivered
[X] Regular U.S. Mail
[ ] Certified U.S. Mail
[ ] Overnight Mail
[ ] Facsimile To:

Julie R. Vetter

JULIE R. VETTER
Legal Assistant to
IAN D. SMITH
Attorney at Law